United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1969-2366

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 74-1969-2366

IIT, an International Investment Trust, et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

VENCAP, LTD., INTERVENT, INC., INTERCAPITAL, N.V., RICHARD C. PISTELL, CHARLES E. MURPHY, JR., DAVID TAYLOR and HAVEN, WANDLESS, STITT & TIGHE,

Defendants-Appellants-Cross Appellees,

and

WALTER BLACKMAN, ROBERT L. VESCO, MILTON F. MEISSNER, NORMAN LeBLANC and STANLEY GRAZE,

Defendants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

PRELIMINARY STATEMENT

These are appeals from an order entered July 3, 1974, by Judge Stewart in the United States District Court for the Southern District of New York preliminarily enjoining Richard Pistell, a United States citizen and resident, Vencap, Ltd. ("Vencap"), a Bahamian "non-resident" company controlled by Pistell, and two related corporate defendants that he controls, (a) from exercising control over the assets of Vencap and the related corporate defendants and (b) appointing a receiver to take charge of the assets of these corporations. No. 74-1969 is an appeal by Pistell and the corporate defendants. No. 74-2366 is an appeal by

certain defendants not named in the order (74-2366).[1/] The appeals are based on the ground, inter alia, that the court below lacked subject matter jurisdiction over the alleged violations of the federal securities laws which form the basis for this action.

COUNTERSTATEMENT OF THE ISSUE PRESENTED

The Securities and Exchange Commission submits this brief, amicus curiae, in support of the order for preliminary injunction and appointment of a receiver and to discuss the following issue:

> Does a United States District Court have jurisdiction over the subject matter of an action involving violations of the federal securities laws alleged to have been committed (i) by a United States citizen and resident acting with and through a "non-resident" Bahamian corporation which has offices in, and conducts a large part of its business in and from, the United States, (ii) upon an investment company whose shareholders include United States citizens and residents, (iii) when essential steps relating to the sale of the investment in the Bahamian corporation to the investment fund occurred within the United States and (iv) when use is made of the mails and other facilities of interstate commerce in connection with conduct subsequent to the initial investment,

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1/ Defendants Charles Murphy, David Taylor, and Havens, Wandless, Stitt & Tighe, New York attorneys, have appealed purportedly on the basis of 28 U.S.C. 1292(a)(1) & (2). Since they were not included in the July 3 order, it is not apparent how this Court has jurisdiction over their appeals.

alleged to constitute a "looting" of the assets of the company?

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is the federal agency primarily responsible for the administration and enforcement of the federal securities laws, including the Securities Act of 1933 and the Securities Exchange Act of 1934. Private actions by the victims of securities' frauds, however, are a "necessary supplement" to the Commission's enforcement activities. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 382 (1970); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964). The Commission opposes restrictive construction of the federal securities laws and of the Commission's rules that would weaken the protections they afford investors. Accordingly, the Commission as amicus curiae in private actions has argued that the courts should not deny relief to investors whom the securities laws were intended to protect despite the fact that the fraud involved was "novel or atypical" rather than a "garden type variety" method of fraud.[2/]

2/ Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 11 n. 7 (1972), quoting from A.T. Brod & Company v. Perlow, 375 F. 2d 393, 397 (C.A. 2, 1967).

COUNTERSTATEMENT OF THE CASE

The Nature of Plaintiffs' Cause of Action

Plaintiff IIT, an International Investment Trust ("IIT"), is a mutual fund organized under the laws of Luxembourg and was one of the so-called "Dollar Funds,"[3/] the assets of which were managed by companies in the IOS, Ltd. complex. IIT is presently in liquidation under the auspices of a Luxembourg court; the three other named plaintiffs in this action are the liquidators duly appointed by that court.

In the instant case IIT and its liquidators seek to recover what remains of a $3,000,000 investment by IIT in Vencap, a "non-resident" Bahamian corporation formed and controlled by Pistell. The complaint, filed on June 10, 1974, alleged multiple violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 including (i) that IIT's investment in Vencap was part of a conspiracy among the former management of IOS and IIT, on the one hand, and Pistell, Vencap and their associates, on the other hand; (ii) alternatively, that Pistell, Vencap and their associates fraudulently induced IIT to invest in Vencap by means of material misstatements and omissions; and (iii) that, subsequent to the investment of the $3,000,000, Pistell proceeded to loot Vencap of its assets in violation of his fiduciary responsibilities to

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3/ The Dollar Funds were open-end mutual funds managed by IOS, Ltd. whose redemption values were computed daily in United States dollars. The other Dollar Funds are Fund of Funds, Venture Fund and Transglobal Growth Funds.

In early 1972, IIT had assets valued in excess of $250,000,000 (1054a). ["___a" refers to pages in the appendix or exhibit binders]. These assets consisted primarily of readily marketable securities of the leading "blue chip" companies of Europe and the United States and cash. Approximately 52% of IIT's assets were invested in securities issued by U.S. companies (1040a-1041a). These "blue chip" investments were in accord with the stated investment policies of IIT (1013a-1014a; cf. 1036a). Apparently in reliance upon these stated investment policies over 150 United States citizens and over 200 non-citizen residents joined thousands of other investors in purchasing shares of IIT. (154a; 1082a-174a).

IIT, which had contributed substantially all of Vencap's equity capital. The complaint also alleged causes of action arising under principles of common law and international law. Defendants in the action are Pistell, Vencap and certain affiliated companies, Intercapital, N.V. and Intervent, Inc.; Charles E. Murphy, Jr., David Taylor and Havens, Wandless, Stitt & Tighe, Pistell's and Vencap's New York lawyers; Walter Blackman, Pistell's current "partner" in Vencap; and Robert L. Vesco and his associates, Milton F. Meissner, Norman LeBlanc and Stanley Graze.

The plaintiffs, fearing the further dissipation, looting and waste of the assets of Vencap, Intervent and Intercapital, moved for the entry of a preliminary injunction preserving the assets of those defendants and for the appointment of a receiver to marshall and manage their assets pending the resolution of this case. Following an evidentiary hearing, Judge Stewart granted these requests for ~~interim~~ INTERIM relief, finding that plaintiffs had demonstrated (i) a substantial likelihood of success in proving their case, (ii) that the continued waste of the assets of Vencap indicated the necessity of injunctive relief and the need for a receiver, and (iii) that, without prejudice to the alternative theories of recovery advanced by the plaintiffs, plaintiffs had demonstrated that a three-page memorandum prepared by Vencap, Pistell and Murphy served as an inducement to IIT to make its investment in Vencap and that the memorandum was false and misleading in violation of the federal securities laws, particularly Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder.

The Origin of IIT's "Investment" in Vencap

Richard Pistell is a United States citizen and resident who has been active in various business endeavors in this country (Pistell Br. 9; 512a-513a).[4] In early 1972 Pistell met Robert Vesco[5] at the Metropolitan Club in New York, after which they began a series of business dealings (726a; 1285a-1286a; 1300a; 1320a-1328a). At a meeting concerning one of these business dealings Pistell met Stanley Graze (514a-515a), the investment adviser to the Dollar Funds and a close associate of Vesco's. Pistell and Graze continued their contacts after the initial meeting and discussed possible liquidation of IIT's portfolio of securities (514a-515a; 579a-580a; 1307a-1308a).[6]

4/ "___a" refers to pages in the appendix or exhibit binders.

5/ At this time Vesco controlled IOS through his position as Chairman of the Board and Chief Executive Officer of International Controls Corp., which had purchased the controlling shares of IOS, Ltd., the parent of the corporate complex that managed the assets of IIT and the other ~~Dollar~~ DOLLAR Funds.

6/ Beginning in April 1972 and continuing through October 1972, IIT had net sales of over $121,708,019 of its securities of United States corporations (4046a-4103a). American National Bank & Trust Co., a New Jersey bank which was a custodian of securities for IIT, effectuated the sales through broker-dealers on the New York Stock Exchange and in other American securities markets (236a-237a). The instructions for the transactions were sent over American telex wires and the proceeds of the sales were forwarded through American banking channels (237a; 4104a-4106a; 4110a).

The Commission has alleged that these sales were a part of a scheme by Vesco and his group, including Graze and Meissner, to loot the Dollar Funds in violation of the federal securities laws. Securities and Exchange Commission v. Vesco, 72 Civ. 5001 (S.D. N.Y.). According to the allegations in that action, the proceeds of the sales were spirited away to Vesco-controlled companies in the Bahamas, Costa Rica, Panama and elsewhere. In September 1973 Judge Stewart granted the Commission's motion for a preliminary injunction against Vesco, Meissner, Graze and others based on the extensive evidence presented in support of the Commission's motion. Appeals from that injunction are pending in this Court.

In June 1972, Pistell instructed his New York attorneys to form Vencap as a non-resident Bahamian corporation (667a; 3917a). Pistell and a business associate bought the 4,000. common shares of Vencap, each paying $2,000 for half the shares (552a; 3917a).[7/]

Pistell then looked to the Dollar Funds for capital contributions for Vencap. In August 1972 Pistell and Graze discussed the broad outlines of an IIT investment in Vencap (1366a; 1825a-1826a; 3717a-3719a). Shortly thereafter Vencap's shareholders authorized the issuance of 30,000 redeemable preference shares. The specific terms of the preference shares (discussed infra) were drafted in New York by Pistell's lawyer (603a; 661a-662a; 1825a-1827a). In September another of Pistell's New York attorneys drafted a three-page memorandum (659a-660a; 667a-668a; 778a-780a), which, as Judge Stewart found (961a), was used to induce IIT's $3,000,000 purchase of the preferred shares. This memorandum, described by defendants as complete and accurate as written (683a-684a; 778a-782a), failed in fact, as we show below, to disclose facts which would have affected the investment decision of a reasonable investor. The agreement to purchase Vencap's stock was prepared in New York by IIT's New York counsel, apparently after consulting with Vencap's counsel (602a-603a).

In September 1972, during the mass liquidation of the United States securities held by IIT, American National Bank & Trust was instructed to transfer $3,000,000 of the proceeds to Bahamas Commonwealth Bank for an account denominated "Vencap" (4104a-4105a). This transfer was accomplished,

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7/ The original associate, Amoury de Reincourt, transferred his shares to defendant Walter Blackman in May 1973 (553a; 777a).

and on September 29, 1972, IIT, using this money from IIT's account at American National Bank & Trust, purchased the 30,000 shares of Vencap preferred stock at a cost of $3,000,000 (954a; 960a; 4106a-4107a).

Pistell Appropriates Monies Belonging to Vencap For His Own Personal Uses And Otherwise Strips Vencap Of Its Assets.

Almost immediately after Vencap received the $3,000,000, Pistell began using the money for personal expenses. Through a circuitous route Pistell caused Vencap to lend him $590,000 which Pistell used to pay off his taxes, personal loans and to satisfy a judgment against him (584a-600a; 704a; 706a; 4146a).[8/] He later borrowed an additional $55,000 from Vencap (2151a-2152a). Pistell also used Vencap monies to pay his ex-wife's alimony and his present wife's phone bills (792a; 798a-799a; 4132a; 4138a). Further, Pistell received "compensation" from Vencap totalling over $350,000, a rate of $17,000 per month (546a; 4148a).[9/] At the same time he was receiving over $110,000 in expense money (4148a),[10/] Pistell also caused Vencap to purchase in the domestic securities markets $835,000 worth of securities of United States corporations, including $672,000 shares of Lincoln American Corp., a corporation formerly managed by Pistell (703a; 4149a-4151a). The operations of Vencap have been conducted

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8/ Pistell argues (Br. 21-22) that the loan transaction, which used a Swiss bank and defendant Intercapital as intermediaries, was fully collateralized by the pledging of Pistell's ~~shres~~ SHARES of Flag-Redfern Oil Company to the bank and therefore there is no danger to Vencap's $600,000 time deposit at the bank, which is also collateral for the loan to Pistell. If the Flag-Redfern stock is sufficient collateral for the loan, it is difficult to see why Pistell caused Vencap to make the time deposit at the Swiss bank and why the deposit was needed as collateral. In any event, Vencap has lost the use of the $600,000 for the period it is used as collateral for the loan to Pistell (cf. 591a).

9/ This is computed over the 20-month life of Vencap, from October 1972 until the filing of the instant complaint in early June 1974.

10/ In addition, Vencap incurred professional fees totalling more than $300,000 (4148a).

by Pistell from the offices of Havens, Wandless in New York; Vencap's accountants' offices are at Great Neck, Long Island (253a; 603a-606a; 751a; 789a; 3999a).

ARGUMENT

This Court has held that a party seeking to establish its right to a preliminary injunction must demonstrate either a probability that it will succeed on the merits coupled with a threat of irreparable injury, or a balance of hardship decidedly in its favor together with a serious question regarding the merits of the underlying action. E.g., Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F. 2d 687, 692-693 (C.A. 2, 1973); International Controls Corp. v. Vesco, 490 F. 2d 1334, 1347 (C.A. 2), certiorari denied, 417 U.S. 932 (1974). The court below correctly found that IIT would be irreparably harmed if the outflow of Vencap's assets were to continue.[11/] Further, the court correctly found that the balance of hardships was decidedly in favor of IIT, which could lose its total investment in Vencap of $3,000,000, as against Pistell, who has speculated that his $2,000 investment in Vencap might be lost because of the preliminary injunction. As we show below, IIT demonstrated at the evidentiary hearing that it will probably succeed on the merits in proving it was defrauded through securities transactions by the defendants over ~~whom~~ which the court below had jurisdiction. Accordingly, the district court did not abuse its discretion when it issued the preliminary injunction.

11/ As is convincingly demonstrated in IIT's brief (pp. 27-31), Pistell has managed to dissipate almost two-thirds of the assets of Vencap in the short time since IIT's initial "investment" in Vencap to the filing of this lawsuit.

I. Vencap and Pistell violated the antifraud provisions of the federal securities laws in the offer and sale of the preferred stock of Vencap.

The three-page memorandum (967a-970a) given by Vencap to IIT to induce the sale of the preferred shares of Vencap failed to disclose material facts as to Vencap and as to the sale of its securities. The court below correctly found (962a-963a) that memorandum's statement that Vencap's investments would "inure primarily to the benefit of the preferential shareholders" of Vencap was patently untrue.[12/] The court also correctly noted that the document failed to disclose: (1) the total dependence of the preferred shareholders on the whim of Pistell if they were to receive any gain from Vencap (1602a-1604a), (2) Pistell's severe financial trouble which necessitated a substantial loan guaranteed by the money received from IIT (706a), and (3) Pistell's intention to invest Vencap's money in companies in which he had an interest (620a-621a; 784a; 3366a). The memorandum further failed to disclose that Pistell planned to use Vencap as his personal pocketbook (773a; 4119a-4147a). In sum, this supposedly complete and accurate memorandum (683a-684a; 778a-782a) was misleading as to three of the most important considerations for the investor--the nature and safety of the

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12/ Under the terms of the Ordinary Resolution by the shareholders of Vencap which created the preferred shares, the preferred shareholders were not entitled to vote for the officers or directors of Vencap and were not otherwise given any control over or protection of their investment. Further they were not entitled to any dividends of Vencap unless such dividends were declared by the directors of Vencap (Pistell) and the preferred shareholders were entitled to receive only a maximum of one-third of Vencap's income. The preferred shares are also subject to a redemption provision pursuant to which Vencap could repurchase the shares at cost plus 6% interest on the portion of the year preceding redemption (1602a-1604a).

investment, the type of return that could be expected from the investment and the character of the individuals to which their investment was entrusted.

The Supreme Court recently reiterated that the federal securities laws "embrace a 'fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.' SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963)." Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972). In furtherance of the congressional policy to proscribe all fraudulent conduct in connection with the sale of a security, the courts have consistently allowed a defrauded purchaser to recover damages from a seller who did not adequately disclose those facts which "a reasonable investor might have considered . . . important in the making of [his investment] decision." Affiliated Ute Citizens, supra, 406 U.S. at 153-154; cf., e.g., Securities and Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (C.A. 2, 1968), certiorari denied sub nom. Coates v. Securities and Exchange Commission, 394 U.S. 976 (1969). The court below properly concluded that Pistell's and Vencap's deceptions were material and therefore they had violated the antifraud provisions of the federal securities laws.

In their briefs defendant-appellants vigorously contest this finding, arguing that the memorandum was merely a "memorial" and that IIT's former managers were fully apprised of the uses to which Vencap would be put and the nature of the "investment." The Commission suggests that this argument proves too much, for it lends great weight to the existence of a conspiracy

between the Vesco group and Pistell. Although the court below chose not to adopt the conspiracy theory for the purposes of the preliminary relief granted in its July 3, 1974, order, Judge Stewart recognized that it was the only alternative explanation of the memorandum and appears to indicate his suspicion, shared by the Commission, that this alternative explanation might ultimately prevail.[13/] In any event, whether the document was used to induce the management of IIT to invest $3 million in Vencap, or to provide a cover-up for such investment, the transaction clearly involved material misrepresentations and omissions "touching" the sale of securities, so as to make it violative of Section 10(b) of the Securities Exchange Act and Rule 10b-5. Cf., Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971); Ruckle v. Roto American Corp., 339 F. 2d 24 (C.A. 2, 1964).[14/]

13/ Adding considerable weight to the probable existence of a conspiracy between Pistell and Vesco is the option given by Pistell and Blackman to LeBlanc, one of Vesco's lieutenants, to acquire the common stock of Vencap at cost, as well other transactions between Vencap and the IOS complex, such as the Chibex investment (1869a; 729a-732a).

14/ In Ruckle, this Court stated (339 F. 2d at 29):

> "We note at the outset that in other contexts, such as embezzlement and conflict of interest, a majority or even the entire board of directors may be held to have defrauded their corporation. When it is practical as well as just to do so, courts have experienced no difficulty in reject-

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Certainly IIT was injured as an investor by Pistell's and Vencap's misappropriation of the money that IIT had invested in Vencap. We have seen that immediately after Vencap received the $3,000,000, Pistell began using the money for non-corporate purposes--to help pay his income taxes, alimony and other personal expenses. Pistell, as a controlling shareholder of Vencap, owed the corporation a fiduciary obligation--one designed for the protection of the entire community of interests in the corporation, non-voting preferred shareholders as well as common shareholders. See Superintendent of Insurance v. Bankers Life & Casualty Co., supra, 404 U.S. at 12; Pepper v. Litton, 308 U.S. 295, 307 (1939).

14/ (continued)

> ing such cliches as the directors constitute the corporation and a corporation, like any other person, cannot defraud itself.
>
> "If, in this case, the board defrauded the corporation into issuing shares either to its members or others, we can think of no reason to say that redress under Rule 10B-5 is precluded, though it would have been available had anyone else committed the fraud. There can be no more effective way to emasculate the policies of the federal securities laws than to deny relief solely because a fraud was committed by a director rather than by an outsider."

II. The federal securities laws were correctly applied to a transaction involving a company which, although nominally Bahamian, was in essence an American corporation whose fraudulent actions were directed by an American citizen.

The defendant-appellants vigorously argue that the district court erred in finding that there was enough connection with the United States to justify application of the federal securities laws. The essence of this argument is that, if this Court looks only at the closing of the sale to IIT in September 1972, there was no significant fraudulent conduct within the United States over which the court below could exercise its subject matter jurisdiction. We agree with plaintiff-appellee IIT (Br. pp. 32-41) that such a myopic approach to the extraterritorial application of the federal securities laws has been rejected by this Court 15/ and that, because many of the significant steps in the fraudulent

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15/ In Leasco Data Processing Equip. Corp. v. Maxwell, 468 F. 2d 1326 (C.A. 2, 1972), the defendants argued that the critical misrepresentations occurred in England and therefore the federal securities laws were not applicable. This Court was not persuaded. Rather, the Court analyzed the entire transaction and concluded that because some of the conduct in the United States was causally connected with the ultimate fraud the court had jurisdiction. "[I]f defendants' fraudulent acts in the United States significantly whetted Leasco's interest in acquiring Pergamon shares, it would be immaterial, from the standpoint of foreign relations law, that the damage resulted, not from the contract whose execution Maxwell procured in this country, but from interrelated action which he induced in England or, for that matter, which Leasco took there on its own." Id. at 1335.

The Court of Appeals for the Eighth Circuit has adopted this analysis, stating: "In our view, subject matter jurisdiction attaches whenever there has been significant conduct with respect to the alleged violations in the United States." Travis v. Anthes Imperial Ltd., 473 F. 2d 515, 524 (1973).

sale and subsequent looting of Vencap were taken in the United States, the district court properly found subject matter jurisdiction. We also agree with IIT (Br. pp. 42-44) that the district court could have found jurisdiction on the basis of the impact upon the United States.[16/]

Defendant-appellants' focus upon the limitations set forth in Leasco is misplaced; the considerations of foreign policy which underlay that decision are inapplicable here. In Leasco this Court was concerned with defendants who were English citizens and who conducted their business activities primarily in England. Subject matter jurisdiction was found over the defendants because of their activities within the United States. The Court, however, was concerned that its opinion not be construed to extend the federal securities laws beyond principles of foreign relations law which regulate a sovereign state's dealings with the citizens of another sovereign state; hence the language in the opinion so heavily relied upon by defendants-appellants. (Pistell Br. 9; see 797a-798a).

The case at bar is different. Here the principal defendant, Pistell, is an American citizen who is admittedly resident of the United States (Pistell Br. at 9; see 797a-798a). The company he controls

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16/ See Schoenbaum v. Firstbrook, 405 F. 2d 200 (C.A. 2), reversed in part on other grounds, 405 F. 2d 215 (1968) (en banc), certiorari denied, 395 U.S. 906 (1969).

and operates, Vencap, although nominally a Bahamian corporation,[17] is run from New York, as Judge Stewart's opinion makes clear.[18] All of its dealings are in United States dollars.[19] It has New York attorneys, New York accountants and New York bankers (500a; 665a-666a; 1696a-1698a; 3997a-3998a; 3999a; 4118a-4147a). It conducted its securities investments through New York brokerage houses (2183a-2368a). Its wholly owned subsidiary, Intervent, was incorporated in Delaware (2107a; cf. 4156-4167). Vencap is a company operated in America by an American; the concern felt by the Leasco

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17/ As a "non-resident" Bahamian corporation, Vencap apparently cannot conduct any meaningful business in the Bahamas. See IIT Br. pp. 12-13, n. 12.

18/ Judge Stewart specifically found (959a-960a):

> "Defendants Haven Wandless, Taylor, Murphy, Pistell, Vencap, Intervent and Intercapital all do and transact business in New York, New York and can be found for jurisdictional purposes within the Southern District of New York. Literally hundreds of transactions and pieces of mail for Vencap and to a lesser extent for Intervent and Intercapital were initiated, directed and consummated from and received at 99 Park Avenue. Pistell testified that 99 Park Avenue was his office and therefore it is effectively that of Vencap, Intervent and Intercapital. Vencap's financial records are maintained in the office of its accountants in Great Neck, Long Island. All the transactional records of Vencap were maintained at "the office" at 99 Park Avenue, New York, New York. On November 16, 1973, Pistell signed an Application Form for Certificate of Authority to do business in Louisiana stating that his address is 99 Park Avenue, New York, New York. Pistell spends much of his business time in New York City purportedly on Vencap's business."

These findings are amply supported by the record. 252a-253a; 579a; 594a-595a; 603a-606a; 751a; 789a; 798a; 1848a; 4118a-4147a.

19/ IIT'S investment in Vencap was in U.S. dollars (1633a). Pistell's compensation was in U.S. dollars (1962a-1969a). Vencap's accounting was done in U.S. dollars (1871a). Even the shares of Vencap were given a par value stated in U.S. dollars (1603a; see 2015a-2016a).

court in applying United States law to the fraudulent activities of foreign citizens is simply not relevant here.

The case at bar is similar to Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970). There plaintiff, a Greek citizen, was injured in New Orleans aboard a ship flying a Greek flag owned by a Greek corporation. The Greek corporation, however, had its largest office in New York and another office in New Orleans. Further, 95% of its stock was owned by a Greek citizen who resided in Connecticut and managed the corporation from New York. The ship earned income carrying cargo to and from the United States. The Court held that the extensive business operations of the alien owner within the United States warranted application of the Jones Act, 46 U.S.C. 688; otherwise, the Court stated, the owner "may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of [the Jones Act]." Id. at 310. The Court continued, id.:

> "The flag, the nationality of the seaman, the fact that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country. If . . . the liberal purposes of the Jones Act are to be effectuated, [20/] the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and owner have with the United States."

20/ Compare Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972), where the Court, quoting from Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963), stated that "Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate their remedial purposes.'"

The Supreme Court's rationale in Rhoditis is even more compelling here, for in addition to operating Vencap out of New York, Pistell is an American citizen.

Unlike the Greek corporation in Rhoditis, Vencap cannot conduct a meaningful business in the country of its incorporation, since it is a "non-resident" Bahamian corporation.[21/] Application of the federal securities laws to the conduct here would not infringe upon the rights of any foreign state. It is well established in international law that a sovereign state may govern the conduct of one of its citizens "even in foreign countries where the rights of other nations or their nationals are not infringed." Skiriotes v. Florida, 313 U.S. 69, 73 (1941); accord Lauritzen v. Larsen, 345 U.S. 571, 587 (1953); Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952). The concept of infringement on the rights of a foreign state involves more than interference with conduct acquiesced in by the foreign state; it involves interference with action affirmatively required by the foreign state. Compare Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), and United States v. Sisal Sales Corp., 274 U.S. 268 (1927), with American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Much of Pistell's conduct, rather than being affirmatively required by Bahamian law, appears to be violative of Bahamian law.[22/]

21/ See n. 17, supra.

22/ Professor Jacob Ziegel, an expert on British corporate law which is the basis for Bahamian corporate law (373a-374a), testified (398a-399a):

> "My own feeling is, an English court in making a judgment could be influenced, substantially influenced by the

(continued)

The principles of Steele v. Bulova Watch Co., supra, 344 U.S. 280, are therefore applicable here. In Steele plaintiff Bulova Watch Co. was a domestic corporation which manufactured watches under a registered trademark. Defendant Steele, a United States citizen and resident, upon discovering that Bulova had not registered its trademark in Mexico, promptly registered the name for himself in Mexico and began manufacturing watches marked "Bulova" in that country. Although the spurious watches were only sold in Mexico, some of them filtered back into the United States. The Court held that defendant Steele was subject to the Lanham Act for his activities. While the acts complained of occurred outside the United States, the Court noted that some of the watch parts were manufactured in the United States and the unlawful activity had an effect on the United States. Id. at 286-287. "In sum," the Court continued, "we do not think that petitioner by so simple a device can evade the thrust of the laws of the United States in a privileged sanctuary beyond our borders." Id. at 287.

22/ (footnote continued)

> alleged sequence of events and might feel that while any one of these individual transactions could have been justified on business grounds, that as a group they appeared to be so abnormal and unusual and so egregious, that they could not be rationalized under the heading of an exercise of business judgment and in fact fortify the conclusion that the directors misdirected themselves, were not pursuing the best interest of the company but were pursuing some other improper goal."

In the context of the present case Pistell's and Vencap's activities, even if they had been conducted outside the United States, have had an impact on the securities markets and upon investors within the United States and the application of subject matter jurisdiction to their conduct is necessary and appropriate to preserve the integrity of the United States securities markets. 23/

CONCLUSION

The order of the district court preliminarily enjoining Pistell, Vencap, Intervent and Inter-capital and appointing a receiver for the assets of Vencap, Intervent and Intercapital should be affirmed.

Respectfully Submitted,

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Dated: March 1975

23/ Compare Securities and Exchange Commission v. United Financial Group, 474 F.2d 354 (C.A. 9, 1973), where jurisdiction was predicated on the finding of three American shareholders.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

March 11, 1975

A. Daniel Fusaro, Esquire
Clerk, United States Court of
Appeals for the Second Circuit
United States Courthouse
New York, New York 10007

Re: IIT, an International Investment Trust, et al. v. Vencap, Ltd., et al., Docket Nos. 74-1969 and 74-2366.

Dear Mr. Fusaro:

Enclosed for filing in the above-captioned appeals are (1) an original and three copies of the MOTION OF THE SECURITIES AND EXCHANGE COMMISSION TO FILE A BRIEF, AMICUS CURIAE and (2) 25 copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE. I hereby certify that I have mailed or caused to be mailed (1) one copy of MOTION OF THE SECURITIES AND EXCHANGE COMMISSION TO FILE A BRIEF, AMICUS CURIAE and (2) two copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, to all counsel listed below.

Sincerely,

David Ferber
Solicitor

Enclosures

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